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Landry's Inc. and its wholly owned subsidiary Bubba Gump Shrimp Co. Restaurants, Inc. and Sophia Flores. Case 32–CA–118213

April 16, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND JOHNSON

On June 26, 2014, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C., April 16, 2015

¹ No exceptions were filed to the judge's finding that, in light of his decision to dismiss the complaint on other grounds, it was unnecessary to address whether the Respondent violated Sec. 8(a)(1) by maintaining language in its social media policy prohibiting employees from using "any words, logos, or other marks" that would infringe upon the intellectual property rights of the Respondent.

² The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We agree with the judge's dismissal of the complaint, which alleges that the Respondent violated Sec. 8(a)(1) of the Act by maintaining an unlawful social media policy in the May 2012 edition of the employee handbook. In so doing, we rely only on the judge's findings that the charge in this case was filed at a time when the May 2012 handbook, which was specifically identified in the complaint as the basis for the alleged violation, without any more general allegation, had already been superseded by the October 2013 handbook and, further, that the October 2013 version was neither alleged nor found to be unlawful. We do not rely on the judge's misstatement that the social media policy in the May 2012 handbook had not been enforced; we find, however, that there is no evidence that the social media policy had been enforced in response to Sec. 7 activity. We also do not rely on the judge's comment that, were the Board to order a remedy here, such a remedy "could be characterized as punitive rather than remedial."

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Shelley Brenner, Esq., for the General Counsel.
Ryan McCortney, Esq. (Sheppard Mullin Richter & Hampton LLP), of Costa Mesa, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in San Francisco, California, on April 22, 2014. The captioned charge was filed on December 2, 2013, by Sophia Flores, an Individual. On January 30, 2014, the Regional Director for Region 20 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Landry's Inc. and its wholly owned subsidiary Bubba Gump Shrimp Co. Restaurants, Inc. (herein jointly referred to as Respondent) of Section 8(a)(1) of the National Labor Relations Act, as amended (Act). An amended complaint was issued on April 1, 2014. The Respondent, in its answers to the complaint and amended complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Landry's Inc. is a corporation with an office and place of business in Houston, Texas where it is engaged in the nationwide operation of restaurants, hospitality venues, casinos, and entertainment establishments through subsidiary enterprises, including Bubba Gump Shrimp Co. Restaurants, Inc. In the course and conduct of its business operations, Landry's Inc. derives gross revenues in excess of \$500,000 and purchases and receives at its Houston, Texas offices goods and services valued in excess of \$5000 which originated directly from points outside the State of Texas. It is admitted and I find that Respondent Landry's Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Bubba Gump Shrimp Co. Restaurants, Inc., is a wholly owned subsidiary of Landry's Inc., and has operated restaurants

in various states, including a restaurant in Monterey, California. In the course and conduct of its business operations Bubba Gump Shrimp Co. Restaurants, Inc. derives gross revenues in excess of \$500,000 and purchases and receives at its Monterey, California restaurant goods and services valued in excess of \$5000 which originated directly from points outside the State of California. It is admitted and I find that Respondent Bubba Gump Shrimp Co. Restaurants, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) of the Act by maintaining an unlawful social media policy in its May 2012 employee handbook, and, assuming *arguendo* that certain handbook provisions violate the act, whether it would effectuate the purposes of the Act to find a violation under the circumstances herein.

B. Facts and Analysis

Landry's Inc. is the ultimate parent corporation of numerous distinct subsidiary corporate entities which together employ approximately 50,000 employees at more than 500 restaurant locations, and other locations, nationwide. Bubba Gump Shrimp Company Restaurants, Inc. is one of the aforementioned corporate entities.

Insofar as the record shows, all 50,000 employees at Landry's subsidiary locations are subject to the terms and conditions of the current edition of Landry's employee handbook which is in effect nationwide.

Upon investigation of the charge filed by Sophia Flores, the Charging Party, the Regional Office determined that Flores was not terminated¹ in violation of the Act as she was not engaged in concerted protected activity in making certain negative statements on a social website regarding her employment.² However the Region determined that the Respondent's social media policy contained in its then-current handbook at the time Flores was terminated, was unlawful and issued the instant complaint on that issue alone.

Flores was a server at a Bubba Gump restaurant in Monterey, California. When she was hired in May, 2011, she was given a then-current Landry's employee handbook. Flores testified that

upon being hired she participated in an orientation during which "We spent a good part of a full day going over each section and subsection of the handbook and reading it thoroughly." She was required to sign an employee handbook acknowledgement form, stating, *inter alia*, as follows:

Since the information, policies and benefits described here are necessarily subject to change, I acknowledge that revisions to the Employee Handbook may occur, except to Landry's policy of employment at will. All such changes will be communicated through official notices, and I understand that revised information may supersede, modify, or eliminate existing policies.

Flores testified that at a "five-minute meeting"³ approximately a year after her initial employment—that is, in about May 2012—she and other assembled employees were told by the supervisor conducting the meeting that there was a revision to the handbook; and further, apparently at the same meeting, the assistant general manager advised the employees that if any employee needed to see the revised handbook there was one available. Flores did not obtain a copy.

The Respondent's 2012 social media policy that was in effect at the time of Flores' termination is no longer in effect and, insofar as the record shows was superseded, prior to Flores' filing of her instant December 2, 2013 charge, by a more recent, and substantially different social media policy contained in a new October 2013 edition of the employee handbook.⁴

Insofar as the record shows, all new employees are given a copy of the employee handbook that is current at the time they are hired, and are required to sign the identical aforementioned employee handbook acknowledgement form that Flores signed. All other employees are told that the handbook has been revised and that a current edition is available for their inspection and use at each restaurant location; it is unclear whether these employees are also offered a copy of the new handbook in the event they want to retain a personal copy.

The complaint herein involves only the social media policy contained in the 2012 edition of the Respondent's employee handbook. The 2012 handbook provides as follows:

³ It appears that "customary" 5-minute meetings were held either at the beginning of every shift or perhaps less frequently to update employees on items of interest and other matters pertaining to their work responsibilities.

⁴ The existence of an updated social media policy was referenced in Respondent's communications to the Regional Office during the investigation of this matter, and was furnished in a highly redacted format. The October 2013 edition of the employee handbook was introduced into evidence by the General Counsel but was not physically furnished to the General Counsel until the end of the hearing. Accordingly, I advised the General Counsel that if there was something in the October 2013 handbook that "you think needs to be litigated or talked about, we can reconvene the hearing." There has been no motion to reconvene the hearing or to amend the complaint to allege that the October 2013 handbook contains an unlawful social media policy or any other unlawful provisions.

¹ The Respondent maintains that Flores was not terminated but was simply relieved of her 2-week notice requirement after tendering her resignation. Thus, Flores had tendered her resignation and, with about 5 days remaining to fulfill her 2-week notice requirement, posted material on a website which came to the attention of management.

² Flores testified that upon inquiring how her posting came to the attention of management she was told by a manager that the Respondent had someone who checked employees' social media sites for such materials. While I credit Flores, I discount the statement of the manager as simply an attempt to prevent a confrontation between Flores and other employees who, according to a position statement from the Respondent during the investigation of this matter (which was not received in evidence for the truth of the matters contained therein), may have brought the matter to the Respondent's attention. It seems rather unlikely that the Respondent would employ social media monitors to monitor the postings of 50,000 employees.

Anyone found to be in violation of any Company policy or provision may be subject to disciplinary action, up to and including termination of employment.

The 2012 social media policy is as follows:

Social media includes all forms of public, web-based communications and expression that brings people together by making it easier to publish content to many individuals. The Social Media Policy applies if you are authorized to represent the Company on social media platforms or if you choose to make references to the Company, its affiliates or officers when you are using social media in a personal capacity. In order to post on external social media sites for work purposes, you will need prior approval from the Vice President of Marketing and acknowledge receipt of the Company's Standards for Social Media Representatives.

While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission. You are personally responsible for the content you publish on blogs, wikis, or any other form of social media. Be mindful that what you publish will be public for a long time. Be also mindful that if the Company receives a complaint from an employee about information you have posted about that employee, the Company may need to investigate that complaint to insure that there has been no violation of the harassment policy or other Company policy. In the event there is such a complaint, you will be expected to cooperate in any investigation of that complaint, including providing access to the posts at issue.

If you identify yourself as a Landry's employee or discuss matters related to the Company's business on social media, please remember that although you may view your site as a blog or a personal project and medium of personal expression, some readers may nonetheless view you as a de facto spokesperson for the Company. You must make it clear that the views you express are yours alone and that they do not necessarily reflect the views of the Company. To help reduce the potential for confusion, please put a disclaimer in a prominent location on your page. For example, "The view expressed on this web site/blog are mine alone and do not necessarily reflect the views of my employer."

Without prior written approval from the Vice President of Marketing, no employee shall use any words, logos, or other marks that would infringe upon the trademark, service mark, certification mark, or other intellectual property rights of the Company or its business partners. All rules that apply to employee activities, including the protection of proprietary and confidential information, apply to all blogs and online activity.

The General Counsel's brief points out that

In this case, Respondent's Landry's Social Media Policy does not explicitly prohibit Section 7 activity. There is no evidence that it was promulgated in response to union or protected concerted activity. Nor has the rule been found to restrict the exercise of Section 7 rights. Thus, the only relevant inquiry in this case is whether employees would reasonably construe the Social Media Policy to prohibit activity protected by the Act.

The General Counsel maintains that employees would reasonably construe the following language to prohibit activity protected by the Act:

While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.

I do not agree. The first sentence does not explicitly prohibit employees from posting their own job-related information or information regarding the jobs of coworkers, or personal information regarding coworkers, or information regarding the company. Rather it urges employees not to do so if such information is likely to create morale problems. Without more, it would be reasonable for employees reading this language to conclude that the Respondent generally frowns upon all job-related postings of any type. However, the cautionary language is modified by the language in the next sentences which may be understood to clarify that the avoidance of morale problems may be "accomplished" by simply being civil to others and their opinions. In other words, it is not the job-related subject matter of the postings that are of concern to the Respondent, but rather the manner in which the subject matter is articulated and debated among the employees.

The foregoing two sentences were obviously crafted to be read together and not in isolation, and a fair effort must be made to give each its intended meaning.⁵ Forethought and civility in the exercise of protected concerted or union activity are not mutually exclusive concepts.⁶ Accordingly, employees reading the Respondent's social media policy could reasonably conclude, I find, that they are being urged to be civil with others in posting job-related material and discussing on social media sites their grievances and disagreements with the Respondent or each other regarding job-related matters. Nor do I find that the admonition regarding "posting personal information about others" would reasonably inhibit employees from posting information regarding coworkers' wages, as the Gen-

⁵ By ignoring this language in the second sentence, the General Counsel, in her brief, seems to be assuming that it is simply irrelevant and of no consequence.

⁶ See *Costco Wholesale Corp.*, 358 NLRB No. 106, at slip op. p. 1 (2012): "We also adopt, for the reasons stated in his decision, the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) by maintaining a rule requiring employees to use 'appropriate business decorum' in communicating with others."

eral Counsel contends. There is no restriction in the social media policy against posting “personnel” information or “payroll information,” or “wage-related information”; and obviously, posting information that in common parlance is generally understood to be personal such as, for example, matters regarding social relationships and similar private matters, could result not only in morale problems but could also constitute “harassment” to which the Respondent’s social media policy refers. It is readily apparent that such postings would likely create enmity among employees in the workplace which could, in turn, adversely affect the Respondent’s business.⁷

In *Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005), the Board quotes from *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), as follows:

[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Id.* at 825, 827.

And the Board goes on to state, at p. 1368, that it is unwilling to “condemn as unlawful a facially neutral workrule that is not aimed at Section 7 activity and was neither adopted in response to such activity nor enforced against it.” Cf. *Labinal, Inc.*, 340 NLRB 203 (2003) (rule that employees should not find out about another employee’s personal pay information and disclose it to others).

Regarding the final paragraph of the social media policy, the General Counsel, citing *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019–1020 (1991), maintains that the language prohibiting any words, logos, or other marks of Respondent without preauthorization is unlawful as the preauthorization requirement may lead an employee to refrain from using such words, logos, or other marks while engaged in Section 7 activity. The General Counsel further maintains that an employee without legal training would not be expected to understand the implications of the language and cannot be expected to have the expertise to examine company rules from a legal standpoint; and therefore, the Respondent’s failure to use lay terms in its social media policy to make clear that employees’ “non-commercial” use of words, logos, or other marks is not infringement, and is permissible without preauthorization, leaves the policy ambiguously overbroad as to its scope.

⁷ The brief of the General Counsel references the last sentence of the social media policy which incorporates into the social media policy “the protection of proprietary and confidential information.” The General Counsel maintains that this language invokes another section of the handbook headed “Non-Disclosure.” The General Counsel further maintains that the Non-Disclosure policy contains language that could be construed to prohibit an employee from posting a coworker’s wages. I find no merit to the General Counsel’s argument. The Non-Disclosure policy is a distinct section of the handbook. It was not alleged in the complaint as being unlawful, it was not referred to during the hearing, and its meaning or interpretation and applicability was not litigated.

The Respondent correctly distinguishes the General Counsel’s analogy of the *Pepsi-Cola* case to the facts in the instant case, and maintains that the Board’s decision in *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), is more closely applicable to the facts herein. Thus, in *Flamingo Hilton-Laughlin*, the rule prohibiting the wearing of hotel uniforms off hotel premises was found to be lawful when the rule was not promulgated in response to union activity and not restricted only to union activities.

The Respondent also cites the analysis in the following General Counsel’s advice memorandum in *Cox Communications, Inc.*, October 19, 2012:

We further find lawful the provision directing employees to “respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights”; and to “not infringe on Cox logos, brand names, taglines, slogans, or other trademarks.” The Employer has a proprietary interest in its trademarks, including its logo if trademarked. Unlike other cases where employers maintained rules that unlawfully prohibited employees from using copyrighted material in their online communications, this rule does not prohibit the use, but merely urges employees to respect the laws. Thus, the provision in context would not reasonably be understood to pertain to or restrict Section 7 activity. (Citation omitted.)

A critical reading of the “Infringement” paragraph would cause a conscientious employee to carefully evaluate its applicability to union-related or concerted activity-related media postings. As infringement is not defined, the employee is placed in the position of having to exercise his or her best judgment in determining whether postings that include particular “words, logos, or other marks” may run afoul of the provision. The provision is similar to the language analyzed in the foregoing General Counsel’s advice memo, and the parties have cited no Board law on the subject. I conclude that as the complaint should be dismissed on other grounds, this matter need not be determined in this proceeding.

As noted, the May 2012 edition of the employee handbook is no longer in effect, and no portion of the current October 2013 edition of the employee handbook has been alleged as violative of the Act herein.⁸ Moreover, I have found that the October 2013 edition of the handbook was issued, distributed and/or announced, and made available to employees, prior to the filing of the instant charge. Further, there is no evidence that any of the social media provisions of the May 2012 edition of the handbook have been enforced against any employee. On the basis of the foregoing, and assuming arguendo that any of the provisions of the expired May 2012 edition of the employee handbook violate the Act, I find that it would not effectuate the purposes of the Act to find a violation herein, and impose a remedy that under the circumstances could be characterized as punitive rather than remedial.

⁸ While the foregoing “infringement” paragraph in the May 2012 edition of the employee handbook is identical to the corresponding paragraph in the October 2013 edition of the employee handbook, nevertheless other language in the social media policy contained in the updated edition may have a bearing on the interpretation of that provision.

Accordingly, I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended

ORDER⁹

The complaint is dismissed in its entirety.

Dated, Washington, D.C. June 26, 2014

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.